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In the

Supreme Court of the United States

October Term, 1987

LOMAR WHOLESALE GROCERY, INC.,
Petitioner,

vs.

DIETER'S GOURMET FOODS, INC.,
GOURMET FOODS, INC.
and ART STONE,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether alleged agreements between three suppliers of branded products with a distributor pursuant to which each of the suppliers agreed not to sell to another distributor constitute, in the aggregate, a per se illegal boycott in circumstances (i) in which the branded products are in free and open competition with similar products carrying other brand name identifications, (ii) in which the distributor denied the opportunity of purchasing the three branded items directly from the brand owners nonetheless purchased and resold rival brands of those products, (iii) in which none of the parties to the alleged agreement possesses any market power whatsoever, and (iv) in which none of the three suppliers agreed with any of the other suppliers.

2. Whether, in the case of a distributor claiming that the refusal of two suppliers to sell their brands of goods to it resulted from price-fixing conspiracies between the suppliers and a rival distributor, the plaintiff may reach a jury on the basis of evidence that the rival distributor made price complaints to a third supplier but has no evidence at all that the rival distributor made any price complaints to the two suppliers who refused to sell to the plaintiff distributor.

LIST OF ALL PARTIES

Lomar Wholesale Grocery, Inc., is the Petitioner. Gourmet Foods, Inc. and Art Stone, the sole stockholder in Gourmet Foods, Inc. are the Respondents. Dieter's Gourmet Foods, Inc. was named as a party in the complaint and in the several amendments of the complaint. Subsequent to the filing of the lawsuit, Dieter's Gourmet, Inc. ceased doing business and the district court permitted counsel for Dieter's Gourmet to withdraw from the case because of the unavailability of funds. Art Stone is also the sole stockholder of Award Foods, Inc., a Texas Corporation.

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BRIEF FOR THE RESPONDENTS IN OPPOSTION

Respondents Gourmet Foods, Inc. and Art Stone respectfully request this Court to deny the Petition for Certiorari filed on behalf of Lomar Foods, Inc.

OPINIONS AND JUDGMENTS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit is reported at 824 F.2d 582. The opinion of the district court is reported at 627 F.Supp. 105.

JURISDICTION

The decision of the court of appeals was entered on July 13, 1987. A petition for rehearing or rehearing en banc was denied on August 13, 1987. The petition for a writ of certiorari was filed on November 12, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

Section one of the Sherman Act, 15 U.S.C. § 1, provides in pertinent part:

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal."

STATEMENT OF THE CASE

A. PROCEEDINGS BELOW AND PROCEDURAL STATUS OF THE CASE.

Petitioner, a competitor of Respondent Gourmet Foods, Inc., commenced this case in 1979. [Complaint, 1 App. 1.] Petitioner at that time charged the Respondent* with violations of sections 1 and 2 of the Sherman Act, because Dieter's Gourmet Foods, Inc. ("DG"), a supplier of diet salad dressings, would not sell its brand of diet salad dressings to the Petitioner. Later Petitioner amended its complaint to charge additional violations of sections 1 and 2 on the ground that it was unable to purchase a line of diet foods from another supplier, Chicago Dietetic Products, Inc. ("CD"). [First Amendment to Complaint, 1 App. 16.] Petitioner at that time added allegations that Respondent had engaged in primary-line violations of the Robinson-Patman Act and violations of section 2(c) of that Act. Later still, Petitioner charged that Respondent was implicated in an antitrust conspiracy to deny it a line of branded teas from Celestial Seasonings, Inc. ("CS"). [Motion for Leave to Amend Complaint, 1 App. 14.] At that time Plaintiff added to its charges involving DG a claim that it had been denied both DG's ketchup and fish sauce.

Petitioner abandoned its section 2 claims by a further amendment to its complaint in January 1982. [1 App. 20.] In February 1985 Petitioner abandoned all of its Sherman Act Rule of Reason claims, choosing to pursue only per se theories. [Stipulation, 1 App. 264, 270.] Petitioner's claim that CD refused to sell to Petitioner CD's Featherweight brand of diet foods was dismissed by the district court on statute of limitations grounds. Because Petitioner lacked evidence to go to the jury on its Sherman Act claims relating to DG's decision not to sell its brand of diet salad dressings, ketchup and fish sauce to Petitioner and to CS's decision not to sell its brand of tea to Petitioner, the District Court rendered summary judgment against the Petitioner on those claims. *Lomar Wholesale Grocery, Inc. v. Dieter's Gourmet Foods, Inc.*,

*Unless the context otherwise requires, the term "Respondent" refers to Gourmet Foods, Inc. The only actual or alleged activities of Art Stone relevant to this case are those taken in his capacity as president of Gourmet Foods, Inc.

627 F.Supp. 105 (S.D. Iowa 1985). The District Court also entered summary judgment against the Petitioner on all of its Robinson-Patman Act claims. Id., 627 F.Supp. 117 (S.D. Iowa 1985). The District Court's rulings were unanimously affirmed by the U.S. Court of Appeals for the Eighth Circuit. *Lomar Wholesale Grocery, Inc. v. Dieter's Gourmet Foods, Inc.*, 824 F.2d 582 (8th Cir. 1987).

At this stage, the Petitioner seeks review only of the Court of Appeals' affirmance of the District Court's dismissal of Petitioner's boycott claim and of Petitioner's price-fixing claims relating to the DG brand of diet salad dressings, ketchup, and fish sauce and to the CS brand of tea. [Petitioner's Brief, p. i (questions presented).] Petitioner is not seeking review of the dismissal below (on statute of limitations grounds) of its Sherman Act claim relating to CD's decision not to sell its brand of diet foods to Petitioner. Petitioner's Brief, p. 8n.5. Nor is Petitioner seeking review of the dismissal of its Robinson-Patman Act claims. Petitioner's Brief, p. 9n.6.

For the reasons stated below, there is no basis for this Court's review. One Federal District Court judge and three Federal Appeals Court judges have all concluded that the Petitioner lacks evidence sufficient to reach a jury on its claims. There is no substantial difference of views among the Circuits on the law to be applied. There is, accordingly, no useful purpose to be served by granting the Petitioner's application.

B. THE FACTS

Petitioner and Respondent sell groceries at wholesale to retail grocery stores. Petitioner and Respondent are specialty foods distributors, a kind of wholesaler which makes use of salespersons who make personal contact with their grocery-store customers. Specialty foods distributors differ from grocery "warehouses" in that the latter are generally very much larger than specialty foods distributors and handle extremely large volumes of each item in their inventories. Also, grocery warehouses generally do not employ traveling sales personnel; they respond to, but do not solicit, orders from customers. [Plaintiff's Response to Statement of Undisputed Fact Nos. 1–8, filed July 12, 1984, 1 App. 204–206.] Despite these differences in size and in the methods of maintaining customer

contact, specialty foods distributors and grocery warehouses sell to the same customers, retail grocers operating supermarkets. [Petitioner's Brief, p.3] Specialty foods distributors compete directly with grocery warehouses by selling competing brands of the same products and by sometimes selling the identical brands of products which are found in one or more warehouses. [Plaintiff's Response to Statement of Undisputed Fact No. 9, filed July 12, 1984, 1 App. 206.][1] Prices charged by specialty foods distributors are constrained by competition from other specialty foods distributors as well as from grocery warehouses. Petitioner's president has admitted that competition from warehouses constrains his pricing determinations. [Deposition of Lou Hurwitz, p. 51, line 21 - p. 53, line 10 (Nov. 4, 1981), quoted in part in 3 App. 481.]

Petitioner and Respondent compete with numerous other specialty foods distributors. [Deposition of Lou Hurwitz, p. 219, line 17 - p. 222, line 21; p. 278, line 21 - p. 279, line 3; p. 280, lines 13-19 (Aug. 25, 1981); Deposition of Lou Hurwitz, p. 77, lines 5-19; p. 287, line 11 - p. 291, line 23 (Nov. 4, 1981).] While this litigation has been in progress, one of the largest grocery warehouses in the Midwest has opened a major specialty foods distribution center in La Crosse, Wisconsin, a location geographically proximate both to Petitioner's operation in Des Moines, Iowa and to Respondent's operation in St. Paul, Minnesota. [Plaintiff's Response to Statement of Undisputed Fact No. 11, filed July 12, 1984, 1 App. 207.] In addition to these specialty foods distributors, Petitioner and Respondent also compete with numerous grocery warehouses which dwarf them in size and which handle competing brands of almost every product handled by either Petitioner or Respondent. [Deposition of Lou Hurwitz, p. 52, line 15 - p. 53, line 3; p. 76, lines 14-22; p. 77, lines 13-18 (Nov. 4, 1981).] Petitioner and Respondent are both miniscule actors in a market

[1]Contrary to Petitioner's statement on p. 3 of its brief, Petitioner admitted below that "All items having significant volume for specialty food distributors compete with similar but not always identical items handled by some grocery warehouses as well as with similar but not always identical items handled by other specialty food distributors." [Plaintiff's Response to Statement of Undisputed Fact No. 9, filed July 12, 1984, 1 App. 206-207.]

dominated by large grocery warehouses.[2] Nonetheless, Petitioner is the largest specialty foods distributor within the state of Iowa. [Plaintiff's Response to Statement of Undisputed Fact No. 24, filed July 12, 1984, 1 App. 211–212. Deposition of Lou Hurwitz, p. 221, lines 11–15 (Aug. 25, 1981).] Petitioner is as large as Respondent in Nebraska and South Dakota. [Id., p. 221, lines 19–20]; Petitioner outsells Respondent in Wisconsin by 70–30 ratio. [Id., p. 222, lines 12–16]; Petitioner outsells all specialty foods distributors combined in Kansas, and Petitioner's sales are equal to all other specialty foods distributors combined in Missouri. [Id., p. 222, lines 6–16.] The parties agree that the wholesale grocery market is always in a state of flux with changes constantly occurring in market shares, firms, prices, and products. [Plaintiff's Response to Statement of Undisputed Fact No. 38, filed July 12, 1984, 1 App. 215.]

C. PETITIONER'S CLAIMS

Late in 1973 the Respondent became the Upper Midwest distributor for a particular brand of diet salad dressings, ketchup and fish sauce, "Dieter's Gourmet". It is undisputed that Respondent handled that line under a distribution arrangement pursuant to which the supplier (DG) had the right to add an additional dis-

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[2]The 1981 wholesale level sales of Respondent and Petitioner were, respectively, $26,344,000 and $7,204,880. [Plaintiff's Response to Statement of Undisputed Fact Nos. 20–21, filed July 12, 1984, 1 App. 210–211.] Retail sales for 1981 in the Des Moines market area were $1,553,119,000 and in the Minneapolis-St. Paul market area were $3,744,925,000. [*Progressive Grocer's Marketing Guidebook* 494, 524 (1982), 4 App. 258–277.] Even at an unrealistically high retailer-level average gross profit margin of 24% (which would have the effect of magnifying the market significance of the wholesale sales of both Respondent and Petitioner) Respondent accounts for less than 1% of the wholesale grocery sales in the Minneapolis-St. Paul market area and Petitioner accounts for 0.6% of the wholesale grocery sales in the Des Moines market area. Moreover, because the sales of both Respondent and Petitioner are spread throughout several states, their respective percentage shares of the above market areas are further reduced. The sales of Respondent in the Des Moines market area — the center of the greater Iowa area where Petitioner does business — are patently less than one percent! The sales of both Petitioner and Respondent are dwarfed by the sales of the grocery warehouses. [See *Progressive Grocer's Marketing Guidebook* 492, 522 (1982) (data on "distribution centers"), 4 App. 272, 275.]

tributor or to replace the Respondent entirely upon 30 days notice. [Plaintiff's Response to Statement of Undisputed Fact No. 1, filed Mar. 30, 1984, 1 App. 161–162.] Although Petitioner was unsuccessful in obtaining that line, it handled a competing line, Dia-Mel for which it was an exclusive distributor. [Deposition of Lou Hurwitz, p. 266, line 25 – p. 268, line 3 (Aug. 25, 1981).] Sales of Dieter's Gourmet brand constituted a small percentage of the sales of diet salad dressings in the United States. [Plaintiff's Response to Statement of Undisputed Fact No. 12, filed Mar. 30, 1984, 1 App. 165.] Petitioner has persistently claimed that its inability to obtain this particular brand of salad dressings, ketchup and fish sauce is the result of a per se illegal antitrust conspiracy.

When Petitioner asked DG in 1979 to sell its line of diet salad dressings, ketchup and fish sauce to Petitioner, DG informed Respondent of Petitioner's request. DG wrote Respondent, stating that DG would not decide whether to appoint Petitioner as a distributor until it had taken a market survey to determine the adequacy of its present distribution. [2 App. 342.] Respondent replied, urging caution in evaluating the market survey. [2 App. 344.] DG began the survey, but before it was completed, Petitioner brought this suit against it. Petitioner points to alleged defects in the taking of the survey and contends that the survey was a pretense. From the asserted pretense of the survey, Petitioner seeks to raise the inference of a price-fixing conspiracy.[3] Petitioner has failed to identify any written or oral communications between Respondent and DG about price, other than that DG sought assurances that Respondent passed promotional discounts intended for retailers on to those retailers. [Plaintiff's Response to Statements of Undisputed Fact No. 13 and 14, filed Mar. 30, 1981, 1 App. 165–166; Deposition of Sue Levine, pp. 29, 58–61; Id., 89–91 (Sept. 15, 1981), Addendum to Appellee's Brief to U.S. Court of Appeals pp. 73–76.] The uncontracted discovery record shows that DG made no attempt whatever to control Respondent's prices.

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[3]In refusing to allow Petitioner to reach a jury with such an inference, the Eighth Circuit is not alone. See, e.g., *The Garment District, Inc. v. Belk Stores Services, Inc.*, 799 F.2d 905, 910–911 (4th Cir. 1986), petition for cert. filed, 56 U.S.L.W. 3026 (1987); *Bruce Drug, Inc., v. Hollister, Inc.*, 688 F.2d 853, 857 (1st Cir. 1982); *H.L. Moore Drug Exchange v. Eli Lilly & Co.*, 662 F.2d 935, 941 (2d Cir. 1981), cert. denied, 459 U.S. 880 (1982).

[Deposition of Sue Levine, p. 91, lines 21–25 (Sept. 15, 1981), 2 App. 251.]

Subsequent to its intial complaint, Petitioner added a charge that it was deprived of another line of diet products (CD's "Featherweight" brand) as a result of an antitrust conspiracy. Petitioner's claim involving CD products was based upon CD's refusal to sell to Petitioner on March 5, 1976. CD resumed sales to Petitioner on January 28, 1980. That claim was dismissed on the basis of the statute of limitations. [Plaintiff's Response to Statement of Undisputed Fact Nos. 2, 7, filed Mar. 30, 1984, 1 App. 157, 159.] Petitioner is not seeking review of the dismissal of its claim involving CD's refusal to sell its Featherweight brand of diet foods to Petitioner.

Finally, Petitioner claimed per se violations of the Sherman Act as a result of CS's termination of Petitioner as a distributor of CS's brand of tea. CS terminated Petitioner shortly after Petitioner's president quarreled with CS's regional sales representative over the denial of a prompt-payment discount in connection with the untimely payment of a bill. [Plaintiff's Responses to Statement of Undisputed Fact Nos. 2 and 3, filed Nov. 20, 1984, 1 App. 218.] There is no evidence of any communication between Respondent and CS about resale prices or price competition.

Petitioner is now asserting claims involving vertical price-fixing on DG and CS brands and is also claiming that the separate decisions of the three suppliers not to deal with Petitioner should raise an inference of a per se illegal group boycott. It is undisputed that none of the three suppliers agreed in any way with any of the other suppliers. [Ans. Nos. 4 and 5, Defs' 4th Set of Interrog., filed May 18, 1983, 2 App. 528–530 shows CD was not involved with the other suppliers.] DG concededly went out of business before CS refused to sell to Respondent.

SUMMARY OF ARGUMENT

A. Petitioner's boycott claim is without merit. The Petitioner is asking this Court to rule that a per se illegal boycott would exist when a distributor with no market power whatsoever agrees separately with three suppliers, none of whom possess any market power, that those suppliers will sell to the distributor and not to a second distributor. Respondent contends that the position contended for by Petitioner is inconsistent with this Court's prior rulings on boycotts. Respondent also contends that the position advocated by Petitioner would, if adopted, impose a straightjacket upon manufacturer-distributor arrangements, raising the costs of distribution. It would erect entry barriers to new manufacturers and would impede interbrand competition.

B. Petitioner's price-fixing claims are equally without merit. Petitioner is asking this Court to rule that evidence of a price complaint to one manufacturer by a distributor is evidence sufficient to reach a jury on alleged price-fixing conspiracies between the complaining distributor and other manufacturers to whom the distributor did not complain. Petitioner is thus not only asking this Court to overrule its decision in *Monsanto Corp. v. Spray-Rite Service Corp.*, 465 U.S. 752 (1984); Petitioner is asking this Court to rule that evidence which is even less trustworthy and more remote than the evidence ruled inadequate in *Monsanto* is sufficient to reach a jury. Petitioner's argument carries all of the potential dangers of undermining this Court's decisions in *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36 (1977) and *United States v. Colgate & Co.*, 250 U.S. 300 (1919) which this Court sought to avoid in *Monsanto*. And Petitioner's position would exacerbate those dangers. Because Petitioner's position is inconsistent with prior decisions of this Court, would impede efficient distribution, and would lessen interbrand competition, Petitioner's position is without merit.

It would serve no purpose for this Court to grant review to such meritless contentions. The lower courts are adequately following this Court's prior relevant decisions.

ARGUMENT

The decision of the court of appeals is correct, does not conflict with any decision of this Court or any other court of appeals, and raises no issue warranting further review.

1. The court of appeals and the district court properly concluded that the Petitioner had raised no issue of fact entitling it to reach a jury on the claims which it is still asserting: a claim of an illegal per se boycott; and claims of vertical price-fixing.

A. Petitioner has not raised a valid claim of an illegal per se boycott. Petitioner's claim is that the refusal of three suppliers to sell their particular brands of diet salad dressings, ketchup, and fish sauce (DG); diet foods (CD); and tea (CS), respectively, to Petitioner somehow constitutes an illegal per se group boycott, despite the conceded fact that the three suppliers did not conspire with each other or otherwise communicate among themselves. Indeed, the periods in which these three suppliers refused to sell to Petitioner do not even coincide. DG, the diet salad dressings, ketchup, and fish sauce supplier, went out of business early in 1981, several months before CS stopped selling to Petitioner following a quarrel in July 1981 between Petitioner's president and CS's sales representative over Petitioner's attempt to take a prompt-payment discount on a belated payment for some supplies. Petitioner has explicitly admitted that neither DG nor CS conspired with CD. [Ans. Nos. 4 and 5, Defs.' Fourth Set of Interrogatories, filed May 18, 1983. 2 App. 528–530.] It is thus indisputably clear that no one of the three suppliers agreed with any of the others not to sell to Petitioner.

Petitioner does not dispute the fact that the diet salad dressings, ketchup, and fish sauce; diet foods; and teas involved in this case are all in interbrand competition with other similar foods handled by other specialty foods distributors and by the large grocery warehouses. It is a matter of record, for example, that although Petitioner was not always able to carry the DG brand of diet salad dressing which it desired, it carried Dia-Mel, a rival brand of diet salad dressings. [Petitioner's letter of Oct. 2, 1978 to DG, 2 App. 353.] Petitioner's president has admitted that DG salad dressings compete with the salad dressings of Kraft Foods, Seven Seas (by Acco Foods), Featherweight by Chicago Dietetic, Dia-Mel, Weight

Watchers, Skinny Haven, Wishbone, Tilly Lewis "and probably many, many more" brands as well. [Ans. No. 19, Defs' Second Set of Interrogatories, filed July 2, 1981, 2 App. 393; Deposition of L. Hurwitz, p. 75, line 23 - p. 76, line 21 (August 25, 1981), 2 App. 152-153.] Petitioner agrees that DG brand salad dressing sales "are a small part of the total of all diet salad dressing sales." [Plaintiff's Response to Statement of Undisputed Fact No. 12, filed Mar. 30, 1981, 1 App. 165-166.] Petitioner's own catalogue shows that it carried several brands of seafood sauces [4 App. 243.] and teas. [4 App. 250-252.] Petitioner's president identified the Nature Made brand as competitive with the CD's water-packed fruit and he identified Del Monte and Libby brands as major lines competing with CD's juice-packed fruit, and indeed conceded that CD occupied a relatively small share of the total juice-packed fruit market. [Deposition of L. Hurwitz, p. 89, line 2-21. (November 4, 1981), 4 App. 54.] Petitioner's own catalogue shows other brands (such as Weight Watchers, Estee, S&W, Dia-Mel, Skinny Haven) of various kinds of diet foods carried by Petitioner itself. [4 App. 206-252.] Patently, therefore, no single brand of diet salad dressings, ketchup and fish sauce, diet foods, or tea is necessary to compete in the wholesale grocery market. Moreover, Petitioner bears the burden of proving that access to direct supplies of these three brands are "necessary" to enable it effectively to compete; and it has utterly failed to produce any evidence at all that direct purchases of these three brands are necessary to enable it to compete.

Neither Petitioner nor Respondent possesses any market power. Both are price takers, being constrained by competition from the large grocery warehouses as well as from other specialty foods distributors. As between themselves Petitioner admits that its sales exceed those of the Respondent in its home state of Iowa and in several adjoining states. Their relationships inter se, however, are vastly less important than are their relationships with the large grocery warehouses which dwarf them in sales and which sell most of the same products. Moreover the grocery warehouses carry other brands of all of the three product lines involved in this case. Indeed, CD's Featherweight brand was itself carried by a number of grocery warehouses in Iowa. [See Deposition of Lou Hurwitz, p. 76, lines 14-22; p. 77, lines 13-18 (November 4, 1981), 4 App. 51-52.] Finally, it is clear that neither Petitioner nor Respondent

accounted for more than a fraction of 1% of the wholesale grocery sales in their principal areas of sales.[4]

Petitioner's claim of a per se illegal boycott is derived from allegations that Respondent induced three suppliers not to sell to it. This claim of Petitioner is essentially that when a distributor acquires three exclusive distributorships a per se illegal group boycott should be inferred. Petitioner draws its principal support for its argument from this Court's decision in *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959), despite the fact that *Klor's* involved a conspiracy among several rival suppliers whereas in the present case the suppliers did not conspire among themselves.

In *Klor's*, this Court took pains to point out that its decision was not intended to question the lawfulness of exclusive distributorships. 359 U.S. at 212. In *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36 (1977), this Court ruled that — because they were not almost always anticompetitive — nonprice vertical restraints normally should be governed by the Rule of Reason. 433 U.S. at 57–59. In *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752 (1984), this Court reaffirmed its concern that nonprice vertical restrictions should be governed by the Rule of Reason. 465 U.S. at 761–764. These concerns underlie this Court's ruling that a terminated distributor is not entitled to get to a jury on a price-fixing claim solely on evidence that another distributor has complained to its supplier about the undercutting pricing of the terminated distributor. In this case, the Petitioner's novel boycott claim is a complaint about nonprice vertical restrictions: Petitioner is asking this Court to rule that an inference of a per se illegal boycott can be drawn from separate decisions by three different suppliers — who had no communications among themselves — not to sell their respective brands to the Petitioner and instead to sell those brands to the Respondent as their principal distributor for the area in question. At most Petitioner can claim the existence of three separate exclusive distributorships, two of which were terminable at will and one on thirty days' notice. Petitioner's attempt to transform these three instances of this legitimate competitive distribution arrangement into a per se illegal boycott should be given no consideration at all by this Court.

[4]See note 2, supra.

At numerous times this Court has expressed its concern that the per se rule be limited to those situations involving restraints which are almost always anticompetitive. *FTC v. Indiana Fed. of Dentists*, 106 S.Ct. 2009, 2018 (1986); *Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.*, 472 U.S. 284, 289–290 (1985); *National Collegiate Athletic Ass'n v. Board of Regents of Univ. of Okl.*, 468 U.S. 85, 103–104 (1984); *Broadcast Music, Inc. v. Columbia Broadcasting Sys., Inc.*, 441 U.S. 1, 19–20 (1979). It was because vertical nonprice restraints were not obviously always or almost always anticompetitive that this Court ruled in *Continental T.V., Inc. v. GTE Sylvania, Inc.*, supra, that their lawfulness should normally be evaluated under the Rule of Reason. This Court reaffirmed that concern in *Monsanto*, supra.

In the very recent past this Court has been especially concerned to limit the application of the per se rule in connection with alleged boycotts to those group refusals to deal which are almost always anticompetitive. In *FTC v. Indiana Fed. of Dentists*, supra, this Court warned against indiscriminate expansion of the per se rule to group refusals to deal beyond the categories to which it had been applied in the past. In *Northwest Wholesale Stationers*, this Court pointed out that the class of cases to which the per se rule should be applied is a limited one.

> "Exactly what types of activity fall within the forbidden category is . . . far from certain . . . Some care is therefore necessary in defining the category of concerted refusals to deal that merit *per se* condemnation." 472 U.S. at 294.

In *Northwest Wholesale Stationers* the Court provided guidance as to where the per se rule should be applied in the future by pointing out where the per se rule has normally been applied in the past:

> "Cases to which this Court has applied the per se approach have generally involved joint efforts by a firm or firms to disadvantage competitors by 'either directly denying or persuading or coercing suppliers or customers to deny relationships the competitors need in the competitive struggle.' . . . In these cases, the boycott often

> cut off access to a supply, facility, or market necessary to enable the boycotted firm to compete . . . and frequently the boycotting firms possessed a dominant position in the relevant market. . . . In addition, the practices were generally not justified by plausible arguments that they were intended to enhance overall efficiency and make markets more competitive." Id.

This Court reiterated this admonition in *FTC v. Indiana Federation of Dentists*, supra, where it again pointed out that "the category of per se restraints classed as group boycotts has generally been limited to cases in which firms with market power boycott suppliers or customers in order to discourage them from doing business with a competitor." 106 S.Ct. at 2018. In this case Respondent has no market power. Respondent is concededly constrained not only by competition with the Petitioner and other specialty foods distributors but is also constrained by competition from giant grocery warehouses. Moreover, Petitioner has not been denied something essential for it to compete. It has been denied direct access[5] to three branded lines, all of which have competing lines in the marketplace and Petitioner has in fact handled one or more lines competing with each of the three branded lines. It is absurd in these circumstances for Petitioner to assert a claim of a per se illegal boycott. Indeed, Petitioner is in effect asking this Court drastically to revise the corpus of the antitrust decisions which it has issued over the past ten years.

In short, under the standards which this Court has been articulating, especially in *Northwest Wholesale Stationers* and *Indiana Federation of Dentists*, supra, Petitioner has stated no per se claim. Petitioner has been denied nothing that is essential for it to compete. Its inability to purchase directly three branded items for which there are many other brands available to it did not hinder it in any way from competing vigorously in the marketplace.

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[5]Petitioner can purchase the brands in question from secondary suppliers if it so wishes. During much of the period when DG was in business, Petitioner purchased the DG brand from Super Service, Inc. [Plaintiff's Response to Statement of Undisputed Fact No. 7, filed Mar. 30, 1984, 1 App. 163.]; and Petitioner currently purchases the CS brand of teas from secondary suppliers. [Plaintiff's Response to Statement of Undisputed Fact No. 9, filed Mar. 30, 1984, 1 App. 222.]

Respondent has absolutely no market power. In these circumstances, the teaching of this Court is that even were the Petitioner to establish that each of the three suppliers had separately agreed with Respondent not to sell to the Petitioner, the per se rule would not apply.

This Court has been concerned to allow manufacturers and suppliers to establish the kinds of distribution arrangements which best meet their needs, because that is the way that they can most effectively compete in the marketplace. In the case at hand, the record shows that DG often marketed its goods through regional distributors like the Respondent. [Deposition of Sue Levine, p. 122, line 24 - p. 127, line 4; p. 128, lines 4–11, 2 App. 259–264, 265.]

This Court's decision in *GTE Sylvania* permitted manufacturers and suppliers to design efficient and cost-effective distribution systems. Distributors like Petitioner and Respondent exert efforts to market the particular brands which they carry and possess incentives to ensure the quality of the goods they are carrying. In the instant case, for example, after Petitioner's sources of DG brand dried up in 1979, Respondent marketed DG brand of diet salad dressings while Petitioner marketed a rival brand, Dia-Mel. Had Petitioner been marketing the DG brand, it would have been less concerned to sell Dia-Mel; it might even then have dropped the Dia-Mel line. Moreover, exclusive distributorships help to ensure the quality of the goods delivered. In the food business, for example, distributors like Petitioner and Respondent can more easily be called to account by their retailer customers for spoilage when a particular brand is identified with a particular distributor.

Petitioner indulges in obfuscation when it employs the phrase "dealer-coerced boycotts". First of all, since only per se activity is relevant to this case, Petitioner must be intending to refer to per se illegal activity; and there is nothing in this case that remotely resembles the kind of activity which this Court calls per se illegal "boycotts". Under the standards of this Court, Respondent does not begin to come near any type of activity which is a per se illegal boycott, dealer coerced or otherwise. Respondent has no market power whatsoever; the record is barren of any evidence of market power. Indeed, it is clear that both Respondent and Petitioner are under intense competitive pressure from the giant grocery warehouses, that they represent a miniscule portion of the

wholesale grocery market in their areas of operation and that both Respondent and Petitioner are price takers. It is also absolutely clear that Respondent has been denied nothing that it needs to compete. That it has been unsuccessful in handling one brand of diet salad dressings, ketchup and fish sauce; one brand of diet foods; and one brand of tea could not possibly have impeded it in any way from competing in the sale at wholesale of grocery products to retail grocery chains. The record shows that it handled other brands of each of these items. Indeed, the most obvious inference is that interbrand competition probably was enhanced, as Petitioner then promoted rival brands of these products rather than free-riding off of the promotional efforts of the Respondent. In any event, it is clear that nothing has been alleged which even remotely resembles a per se illegal boycott.

Second, petitioner is using the phrase "dealer-coerced" to suggest that the distribution arrangements were, at least in part, arrived at through the bargaining of the Respondent. Respondent had no power to "coerce" anyone. Many brands of the products involved in this case are marketed all over the United States by grocery warehouses and specialty foods distributors. The way Petitioner is using the phrase "dealer-coerced boycott", it would apply to all exclusive distributorships in which distributors bargained with their suppliers about the terms of the distributorships. Petitioner's approach would make it per se illegal for a distributor to bargain with more than one supplier about the terms of exclusive distributorships. In such circumstances the distributor necessarily would be asking its supplier not to sell to a rival distributor. When such a request was made to more than one supplier, then according to the Petitioner, this would be a "boycott". When the supplier acceded to the distributor's request, the "boycott" would be "dealer-coerced."

Petitioner is playing with words in a way which is most dangerous for the operation of a freely competitive marketplace. Distribution arrangements are frequently the subject of bargaining between suppliers and distributors. Petitioner is asking this Court effectively to rule that bargaining about the terms of a distributorship by the distributor is per se illegal. Petitioner effectively admits this when it concedes that "There are, of course, certain difficults [sic] to be encountered in establishing acceptable levels of proof

distinguishing coercive behavior from a supplier's acquiescence in the dealer's demands." [Petitioner's Brief 20 n.8.][6] Petitioner is also asking this Court to rule that the holding of more than one exclusive distributorship by a single distributor is a per se illegal boycott. Just to describe Petitioner's contentions reveals their perniciousness. They are anticompetitive in the extreme: They would prohibit suppliers and distributors from bargaining about the terms of exclusive distribution arrangements. And they would treat multiple exclusive distributorships as per se illegal, because Petitioner's "boycott" contention rests upon the premise that three suppliers chose to do business with Respondent and not with Petitioner. Petitioner's contentions would drastically undermine the salutary effects of this Court's ruling in *GTE Sylvania;* and would impose a straightjacket upon the marketplace, raising the costs of distribution, preventing suppliers from competing for the services of particular distributors, and denying the availability of multiple exclusive distributorships in the food and other industries where those arrangements have helped to enhance the level of competition in the marketplace.

Petitioner's use of such labels as "dealer-coerced boycotts" ignores this Court's admonition in *Broadcast Music* that "easy labels do not always supply ready answers." 441 U.S. at 8. Indeed, for all of the reasons pointed out above, Petitioner's label is not only "overly simplistic and . . . overbroad", 441 U.S. at 9, as in *Broadcast Music* but is affirmatively misleading. The conduct described is not a per se illegal "boycott"; it is not "coerced" in any meaningful sense at all; and the conduct challenged is likely to enhance, rather than to diminish, interbrand competition.

It is necessary to add a further word about the novel theory of per se illegality which Petitioner urges. Petitioner asks this Court to ignore the claims of conspiracy among the suppliers which were carefully included in this Court's opinion in the *Klor's* case. Here the Petitioner refers to the allegations of conspiracy among the manufacturers in the *Klor's* case as "implausible"; indeed, Petitioner asserts that they were mere "boilerplate" which are properly

[6]Petitioner's citation of Professor Areeda is misplaced. Areeda points to the very administrative problems which Petitioner would ignore when Petitioner urges the Court to adopt a rule which turns upon who "motivated" a vertical restraint. VII P. Areeda, *Antitrust Law*, paragraph 1457 at p. 176 (1986).

ignored. Petitioner thereby asks this Court to articulte a radically new and revisionist interpretation of *Klor's*. When this Court wrote the *Klor's* opinion, it carefully pointed out the allegations of supplier conspiracy which Petitioner would like to ignore. 359 U.S. at 209 and 213. When this Court has subsequently made reference to the *Klor's* opinion, it has frequently referred to those allegations as integral to the *Klor's* decision. *FMC v. Svenska Amerika Linien*, 390 U.S. 238, 250 (1968) (" . . . any agreement by a group of competitors to boycott a particular buyer or group of buyers is illegal per se," citing *Klor's*); *United States v. General Motors Corp.*, 384 U.S. 127, 145 (1966); *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365, 372–372 (1967) (describing *Klor's* as involving a horizontal conspiracy); *St. Paul Fire & Marine Ins. Co. v. Barry*, 438 U.S. 531, 544–545 (1978). In many other cases where this Court has cited *Klor's*, the horizontal aspect of the conspiracy before the Court was apparent. *Radiant Burners, Inc. v. Peoples Gas Light & Coke Co.*, 364 U.S. 656 (1961); *Silver v. New York Stock Exchange*, 373 U.S. 341, 347 (1963); *FTC v. Indiana Fed. of Dentists*, 106 S.Ct. 2009 (1986); *Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.*, 472 U.S. 284 (1985); *NCAA v. Board of Regents of Univ. of Okl.*, 468 U.S. 85, 110 n.41 (1984).

Petitioner's theory is so fantastic that there is little likelihood that any court will accept it. Under all of the standards of interpretation, *Klor's* would be read by the lower courts as involving an agreement between Broadway-Hale, the conspiring distributor and several manufacturers of electronic equipment who, as this Court expressly pointed out, were alleged to have conspired among themselves.

Moreover, Petitioner's theory ignores another important admonition put forward by this Court. This Court has repeatedly insisted that the per se rule is to be limited to those kinds of agreements which the courts know from experience to be predominately anticompetitive. The Courts do not know from experience that separate agreements between a distributor and three different suppliers pursuant to which those suppliers sell to that distributor and not to another are in the aggregate so anticompetitive that application of the per se rule is warranted. Indeed, they know the opposite: They know that exclusive distributorships are likely to

produce procompetitive effects. And they have every reason to believe on the basis of that experience that multiple exclusive distributorships are likely, in highly competitive industries like the food industry where distributors handle large numbers of items,[7] to enhance that already high level of interbrand competition. Indeed, Petitioner's position would make the holding of more than one exclusive distributorship by a single firm impossible. Petitioner's contention would impose a stranglehold upon the rich variety of distribution arrangements that are presently available to business firms. Because exclusivity creates incentives for distributors to promote a brand, the cloud which Petitioner would place upon multiple exclusives would destroy the incentives for distributors to accept new brands. Petitioner's approach would turn the antitrust laws on their head: Petitioner's approach would raise the costs of distribution and thereby make it more difficult for a new brand to enter the marketplace. Petitioner's approach, in short, would impede effective competition.

In addition to its explicit teachings about the scope and limits of the per se rule in boycott cases, this Court's decision in *Monsanto* established the rule that a terminated distributor who alleges that its termination was the result of a conspiracy between the supplier and another distributor must produce evidence of a meeting of the minds of the supplier and the allegedly conspiring distributor to maintain resale prices in order to survive a motion for dismissal. That is an implicit holding that a termination which is the result of a supplier-distributor agreement which is not a price-fixing agreement is not subject to per se condemnation. See, e.g., *Rutman Wine Co. v. E. & J. Gallo Winery,* 829 F.2d 729, 734 (9th Cir. 1987); *Key Financial Planning Corp. v. ITT Life Ins. Co.,* 828 F.2d 635, 640–641 (10th Cir. 1987).

The teachings of this Court that the per se rule is not to be applied in situations like the present one have generally been followed in the lower federal courts. Moreover, almost all of the

[7]In industries, like the food industry, where revenues are generated from the sale of low-priced items, revenues from the sale of more than one item generally will be required to support a distributor. Distributors in such industries, therefore, generally will handle many items. Multiple exclusives in such industries are thus essential to provide distributors with the incentives to promote new brands and thereby to facilitate the entry of new brands into the marketplace.

Circuits explicitly recognize that horizontal concert of action is a necessary component of a per se group boycott claim. *Carlson Machine Tools, Inc. v. American Tool, Inc.*, 678 F.2d 1253, 1259 (5th Cir. 1982); *Dunn & Davis v. NuCar Drive Away*, 691 F.2d 241 (6th Cir. 1982); *Products Liability Ins. Agency, Inc. v. Crum & Forster Ins. Cos.*, 682 F.2d 660, 663 (7th Cir. 1982); *Lomar Wholesale Grocery, Inc. v. Dieter's Gourmet Foods, Inc.*, 824 F.2d 582 (8th Cir. 1987); *Rutman Wine Co. v. E. & J. Gallo Winery*, 829 F.2d 729, 733–734 (9th Cir. 1987); *Fine v. Barry and Enright Productions*, 731 F.2d 1394, 1398 (9th Cir.), cert. denied, 469 U.S. 881 (1984); *A.H. Cox & Co., v. Star Mach. Co.*, 653 F.2d 1302, 1305 (9th Cir. 1981); *Key Financial Planning Corp. v. ITT Life Ins. Corp.*, 828 F.2d 635, 641–642 (10th Cir. 1987); *Construction Aggregate Transport, Inc. v. Florida Rock Industries, Inc.*, 710 F.2d 752 (11th Cir. 1983). This understanding is incorporated in the view of the Fourth Circuit which has stated that: "Termination of a distributor resulting from a conspiracy between one competing distributor and one manufacturer is not analyzed under the per se rule regarding concerted boycotts set forth in *Klors, Inc. v. Broadway-Hale Stores, Inc. . . .*" *Terry's Floor Fashions, Inc. v. Burlington Industries, Inc.*, 763 F.2d 604, 610 n.10 (4th Cir. 1985). Petitioner's reliance upon *Com-Tel, Inc. v. DuKane Corp.*, 669 F.2d 404 (6th Cir. 1982) is misplaced, for in that case the court pointed out that the restraint there involved contained "the classical elements of a horizontal boycott" when the plaintiff's codistributors joined in the combination with the manufacturer. 669 F.2d at 412–413.

In the remaining circuits, the courts generally have recognized that the horizontal character of an agreement is an important factor in evaluating its lawfulness. See, e.g., *M & H Tire Co. v. Hoosier Racing Tire Corp.*, 733 F.2d 973 (1st Cir. 1984) ("As a general rule . . . courts subject horizontal boycotts to per se analysis and vertical arrangements to a rule of reason. . . .") These courts, accordingly, have generally taken pains to point out that rulings in favor of terminated distributors have involved horizontal concert of action. See, e.g., *Arnold Pontiac-GMC, Inc. v. Budd Baer, Inc.*, 826 F.2d 1335, 1338–1339 (3d Cir. 1987) (involving "a horizontal conspiracy" among several dealers.); *Malley-Duff &*

Associates, Inc. v. Crown Life Ins. Co., 734 F.2d 133, 142-143 (3d Cir. 1984), cert. denied, 469 U.S. 1072 (1984).

Acceptance of the Petitioner's boycott claim would undo the work of this Court and the lower courts for the last ten years. During that time the courts have rationalized the antitrust laws, ensuring that they serve consumer welfare rather than the interests of individual competitors. For Petitioner to prevail on its claims would be effectively to end the availability of exclusive distributorships, at least in all of those industries where it is customary for a distributor to hold exclusives for several brands, for multiple exclusive distributorships would — under Petitioner's theory — be tantamount to a group boycott.

B. Petitioner has not raised a valid claim that its failure to obtain one or more of the three brands of, respectively, diet salad dressings, ketchup, and fish sauce; diet foods; and tea are the result of illegal per se agreements to control resale prices. Petitioner's price fixing claims essentially ask this Court to overrule its decision in *Monsanto Corp. v. Spray-Rite Service Corp.*, 465 U.S. 752 (1984). This is made absolutely clear by Petitioner's statement of the third question presented by the petition:

> "3. The court of appeals erred in ruling that an agreement to fix prices was not demonstrated by proof that a specialty food distributor was terminated because a competing distributor complained bitterly to suppliers about the terminated distributor's active price competition."

This Court has already ruled that a terminated distributor who claims that the termination was the result of a conspiracy to control prices is not entitled to reach a jury on its claim, if its evidence of conspiracy consists only of evidence of complaints. Other than adding of the descriptive adverb "bitterly", Petitioner's question no. 3 restates the exact issue which this Court disposed of in *Monsanto*.

Moreover, the only evidence of price complaints by Respondent relates to the time-barred claim involving CD's Featherweight brand of diet foods. Petitioner is thus in the untenable position of asking this Court to reconsider its *Monsanto* ruling about the sufficiency of price complaints as evidence of a price-fixing conspiracy

while having no such evidence to offer itself! Surely, if Petitioner's only evidence of price complaints relates to the time-barred claim involving the Featherweight brand of diet foods, it is in no position to ask this Court for a ruling on the evidentiary sufficiency of price complaints.

Petitioner, however, apparently seeks to use what it characterizes as evidence of Respondent's price complaints to CD as evidence of price-fixing conspiracies between Respondent and DG and between Respondent and CS. [See Petitioner's Brief p.8 n.5][8] With all respect, such a position is absurd. For the purposes for which Petitioner would like to use it, that evidence appears to be inadmissible under Rule 404(b) of the Federal Rules of Evidence. And permitting a plaintiff to prove a price-fixing conspiracy between a distributor and a manufacturer on the basis of price complaints which that distributor made to a different manufacturer would produce the perverse results that *Monsanto* sought to avoid only in exacerbated form. *United States v. Colgate & Co.*, 250 U.S. 300 (1919) and *Sylvania* would not only be undermined; they would under such an approach be all but buried.

Finally, there are many practical reasons why this Court should not review Petitioner's price-fixing claims. First. This Court does not need to reconsider the *Monsanto* doctrine. Its decision in *Monsanto* was carefully considered and just as carefully explained. Second. There is no need for this Court to grant review in this case in order to reaffirm its *Monsanto* decision. The lower courts are applying the *Monsanto* doctrine. *Burlington Coat Factory Warehouse Corp. v. Esprit de Corp.*, 769 F.2d 919, 923 (2d Cir. 1985); *Terry's Floor Fashions, Inc. v. Burlington Indus. Inc.*, 763 F.2d 604, 611–615 (4th Cir. 1985); *Business Electronics Corp. v.*

[8]The authorities cited by Petitioner for the admissibility of this evidence are inapposite. In *Spartan Grain & Mill Co. v. Ayers*, 517 F.2d 214 (5th Cir. 1975), the court made clear that it was dealing with evidence of routine business practices of a party. 517 F.2d at 219. In *Hill v. Bache Halsey Stuart Shields Inc.*, 790 F.2d 817 (10th Cir. 1986) evidence of trading behavior of a securities trader was held to be admissible on the issue of that trader's sophistication at the time of earlier trades and on other aspects of earlier trading whose basic pattern resembled the later one. 790 F.2d at 826–827. Neither of these cases support the proposition that a distributor's price complaints to one manufacturer could help to prove conspiracies between that distributor and other manufacturers.

Sharp Electronics Corp., 780 F.2d 1212, 1217–1218 (5th Cir. 1986), cert. granted, 107 S.Ct. 3182 (1987); *Beach v. Viking Sewing Mach. Co.*, 784 F.2d 746, 749 (6th Cir. 1986); *Valley Liquors, Inc., v. Renfeld Importers, Ltd.*, 823 F.2d 656, 660–662 (7th Cir. 1987); *McCabe's Furniture, Inc. v. La-Z-Boy Chair Co.*, 798 F.2d 323, 327–331 (8th Cir. 1986), petition for cert. filed, 56 U.S.L.W. 3026 (1987); *Westman Com'n Co. v. Hobart International, Inc.*, 796 F.2d 1216, 1224 (10th Cir. 1986), petition for cert. filed, 56 U.S.L.W. 3025 (1987). Third. This case is peculiarly unsuited as a vehicle for the Court to explain that decision further because —as pointed out above — the facts of record in this case do not raise the issue which Petitioner seeks to have reconsidered.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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